2011 IL App (2d) 111004-U
No. 2-11-1004
Order filed December 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF BRIAN INGERSOLL, Petitioner-Appellant, and REBECCA INGERSOLL Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Lake County. No. 11-D-370 Honorable Donna-Jo Vorderstrasse, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: Where petitioner failed to establish that he would suffer irreparable harm absent a preliminary injunction ordering respondent to return the parties' minor child to Illinois from Arizona, the trial court's denial of the petition for injunctive relief was affirmed.

¶ 1 Petitioner, Brian Ingersoll, appeals from an interlocutory order of the circuit court of Lake County denying his petition for injunctive relief filed under section 501 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/501 (West 2010)). In the petition, Brian sought a preliminary injunction ordering respondent, Rebecca Ingersoll, to return the parties' minor child from Arizona to Illinois. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Brian and Rebecca were married in 1983 and had three children—Amanda, born April 8, 1988, and now emancipated; Melissa, born June 17, 1992, and attending college in Arizona; and Sarah, born November 11, 1998, and the subject of Brian's petition for preliminary injunction. The parties resided with their children in the marital home in Winthrop Harbor, Illinois, for over 20 years.

¶ 4 On January 28, 2011, while Brian was at work, Rebecca packed a van with some personal belongings and the family pets and took Sarah to live in Arizona. Rebecca left Brian a letter in which she indicated that she was sorry to inform him of her departure by letter, but that she was scared of his temper; said that she had accepted a job transfer to Arizona; explained that she had retained an attorney who would be filing divorce papers "shortly" and included the attorney's contact information; recounted the parties' joint financial obligations and how she proposed dividing them; told Brian not to call her but to reach her through her attorney if necessary; and told Brian to "[h]ave a good life." Brian had no prior notice of Rebecca's intent to leave. Rebecca had told Sarah about the planned move about two weeks before their departure. Brian had noticed that, during those two weeks, Sarah had been "upset" and "would just go hide in her room."

¶ 5 In Arizona, Rebecca secured housing, began a new job, and enrolled Sarah in school with a year-round attendance schedule.

¶ 6 Brian was "absolutely devastated." He called Rebecca numerous times in an attempt to convince her to return home with Sarah. Brian cried at work and had panic attacks. His physician prescribed an antidepressant. His employer of over 20 years considered firing him, and recommended that he seek help from the employee assistance program. For about two months, Brian was on leave from work, attending an outpatient psychiatric program. Brian missed Sarah and

missed being involved in her life on a daily basis. He wanted to teach her to drive and meet her boyfriends.

¶ 7 Brian had four weeks of vacation time each year. Brian exercised visitation with Sarah when she came to Illinois for one week in March 2011 and one week in July 2011. At the time of the hearing on Brian's petition in September 2011, Sarah was scheduled to visit Brian in Illinois for two weeks in October. As of the date of the hearing, Brian had not traveled to Arizona to see Sarah.

¶ 8 On February 22, 2011, Brian filed a petition for dissolution of marriage that included a request that "the minor children [be] returned to the State of Illinois."[1] When it became apparent that Rebecca would not return Sarah, Brian filed a "Petition for Temporary Custody, Injunction and Other Relief" on April 27, and subsequently amended it on June 22. Relevant to the instant appeal, count II, entitled "Petition for Injunctive Relief," asked that the court order Rebecca to return Sarah to Illinois until further order.

¶ 9 On August 30, 2011, Rebecca filed a petition for temporary removal. On September 16, 2011, she filed a petition seeking temporary custody.

¶ 10 On September 23, 2011, the trial court conducted a hearing on Brian's request for injunctive relief in count II of his petition. Brian offered the testimony of Rebecca, as an adverse witness; Gary Schlesinger, the court-appointed guardian *ad litem* for Sarah; as well as his own testimony. Following Brian's presentation of his case, Rebecca moved for a directed finding, which the court granted. The court found that Brian failed to present evidence establishing that he would suffer irreparable harm in the absence of an injunction. The court also stated that, "in every situation that

[1]Brian's request must have included Melissa, who accompanied Sarah to visit Brian in Illinois in March 2011.

involves children, even injunctive relief, *** the best interest of the child needs to be considered." Noting that it did not condone Rebecca's conduct, the court found no evidence that it would be in Sarah's best interests to enter an injunction ordering her return to Illinois. The court entered an order denying count II of the petition. Brian timely filed this interlocutory appeal pursuant to Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010).

¶ 11 ANALYSIS

¶ 12 Brian argues that the trial court erred in applying the best-interests-of-the-child standard to the injunction proceedings, that the court improperly shifted the burden of proving best interests of the child from Rebecca to him, and that the trial court's finding that he failed to prove that he would suffer irreparable harm absent an injunction was against the manifest weight of the evidence. We turn first to Brian's argument regarding irreparable harm.

¶ 13 Section 501 of the Act allows parties to dissolution proceedings to seek temporary relief in the form of a temporary restraining order or a preliminary injunction. Either party may ask the court to enjoin the other party from removing a child from the court's jurisdiction. 750 ILCS 5/501(a)(2)(ii) (West 2010). A party may also ask the court to provide "other injunctive relief proper in the circumstances." 750 ILCS 5/501(a)(2)(iv) (West 2010). Our review of a trial court's grant or denial of temporary relief under the Act is for abuse of discretion. *In re Marriage of Slomka*, 397 Ill. App. 3d 137, 143 (2009). We will not overturn a trial court's ruling on a preliminary injunction unless there was an insufficient showing to sustain its order. *Slomka*, 397 Ill. App. 3d at 143; see also *In re Marriage of Joerger*, 221 Ill. App. 3d 400, 405 (1991) (stating that a trial court abuses its discretion if its findings were contrary to the manifest weight of the evidence).

¶ 14 A preliminary injunction is an extraordinary remedy for situations in which there is an extreme emergency and serious harm would result absent the injunction. *Slomka,* 397 Ill. App. 3d at 143. The party seeking a preliminary injunction must demonstrate: (1) a certain and clearly ascertainable right in need of protection; (2) that irreparable harm will occur absent the injunction; (3) the lack of an adequate remedy at law; and (4) a likelihood of success on the merits of the case. *Slomka,* 397 Ill. App. 3d at 143. The purpose of a preliminary injunction is to preserve the status quo until the case can be resolved on the merits. *Slomka,* 397 Ill. App. 3d at 143. The party seeking a preliminary injunction "must plead facts that clearly establish a right to injunctive relief." *In re Marriage of Schmitt*, 321 Ill. App. 3d 360, 371 (2001). "[A]llegations of mere opinion, conclusion, or belief are not sufficient to show a need for injunctive relief." *Slomka*, 397 Ill. App. 3d at 144.

¶ 15 In the present case, our review of the record reveals that Brian presented no evidence of irreparable harm. Irreparable harm requires a showing that the injury is incapable of compensation or is a transgression of a continuing nature. *Hensley Construction LLC v. Pulte Home Corp.*, 399 Ill. App. 3d 184, 190 (2010); *Joerger*, 221 Ill. App. 3d at 407. Regarding harm to Brian personally, no evidence suggested that the depression he suffered or the time he missed from work extended beyond the two months following Sarah's departure or produced any lasting effects.

¶ 16 Neither did Brian present any evidence of irreparable harm to his relationship with Sarah. Initially, there was no evidence that the relationship would be subjected to a transgression of a continuing nature absent an injunction. Section 609 of the Act provides the process by which Rebecca must seek leave to remove Sarah from Illinois. 750 ILCS 5/609 (West 2010). Although Rebecca originally moved Sarah to Arizona without seeking leave, because she did so when nothing had been filed under the Act, there was no apparent reason for her to seek leave at the time. See *In re Parentage of R.B.P.*, 393 Ill. App. 3d 967, 975 (2009) (applying the Illinois Parentage Act of

1984 (750 ILCS 45/1 *et seq*. (West 2008)) and observing that "[i]f there are no proceedings in place at the time the custodial parent moved from the state, from whom are they to 'request leave?' "). In any case, Rebecca's petition for leave to temporarily remove Sarah was pending at the time Brian filed his notice of interlocutory appeal. At the removal hearing, Rebecca will bear the burden of showing that it is in Sarah's best interests to be removed to Arizona. 750 ILCS 5/609 (West 2010); *Fisher v. Waldrop*, 221 Ill. 2d 102, 116 (2006). Thus, even without the requested injunctive relief, the continuing nature of any harm to Brian's relationship with Sarah is limited by the Act.

¶ 17 Furthermore, Brian offered no evidence of any actual harm to his relationship with Sarah. Notwithstanding Brian's understandable desire to have daily contact with his daughter, the evidence showed that Rebecca made Sarah available for visitation with Brian in Illinois for one week in March and one week in July, and that two weeks of visitation were planned for October. On cross-examination, Brian agreed that Rebecca had offered to have Sarah visit Brian for two weeks in July. Thus, Brian did not take full advantage of the opportunity for visitation at that time. Additionally, the guardian *ad litem*, Gary Schlesinger, testified that Brian and Sarah "did a lot of things together" during their July visit, such as going to the Renaissance Faire, and that Sarah had sleep overs with her friends at Brian's house. Schlesinger also testified that, while Sarah indicated to him that she wanted to live in Arizona with her mother, she also told Schlesinger that she wanted to visit Brian. We note Brian's testimony that his telephone contact with Sarah was diminishing because she was not talkative. This phenomenon is typical of children Sarah's age and in any event, does not diminish the evidence of the vitality of the relationship as described by Schlesinger. We are also aware that, prior to Rebecca's and Sarah's move, Brian spent time with Sarah on a daily basis, helping her with homework, enjoying recreational activities, cooking, and shopping. Nonetheless, divorce marks a change in most, if not all, parent-child relationships. Brian presented no facts that

clearly established his right to injunctive relief. Accordingly, because the trial court's finding that there was no evidence of irreparable harm was not against the manifest weight of the evidence, the court did not abuse its discretion in denying Brian's petition for a preliminary injunction. See *Slomka*, 397 Ill. App. 3d at 144-46 (affirming the trial court's denial of the father's request to enjoin the mother from taking the children to a particular therapist where the father failed to provide a factual basis for his assertion that his relationship with the children was being irreparably harmed).

¶ 18 Nevertheless, Brian contends that, absent an injunction, he will suffer irreparable harm because the trial court, in denying his request for injunctive relief, effectively ruled in favor of Rebecca on the issue of removal. Essentially, Brian's position is that the court should have granted the preliminary injunction in order to maintain the status quo—"to put the parties in the proper position to commence litigation on the substantive issues of custody, visitation and removal." Instead, according to Brian, the court implicitly ruled that the status quo was Sarah living in Arizona with Rebecca, thereby already deciding the issue of removal in Rebecca's favor before a hearing could be held.

¶ 19 Brian's concern about which location is considered the status quo is unfounded. The status quo is the " 'last actual, peaceable, uncontested status which preceded the pending controversy.' " *In re Marriage of Schwartz*, 131 Ill. App. 3d 351, 354 (1985) (quoting *Edgewater Construction Co. v. Percy Wilson Mortgage & Finance Corp.*,44 Ill. App. 3d 220, 228 (1976)). Rebecca's assertion that the status quo consisted of her and Sarah living in Arizona because they were living there when Brian filed his petition for injunctive relief is not persuasive. The parties' controversy began when Rebecca moved Sarah to Arizona—prior to any filing under the Act. Therefore, the last peaceable status preceding the parties' controversy was Brian, Rebecca, and Sarah living together in the marital residence in Winthrop Harbor, Illinois. As noted above, at the hearing on her petition for

temporary removal, Rebecca will bear the burden of showing that it is in Sarah's best interests to be removed to Arizona. It is entirely possible that the trial court, though having denied Brian's request for injunctive relief, may deny Rebecca's petition for temporary removal. See *Fisher*, 221 Ill. 2d at 119 ("[A] circuit court's order denying an injunction is not tantamount to an order granting leave to remove.").

¶ 20 Yet, Brian's position is not unappealing. It is inescapable that Sarah has lived in Arizona for almost a year and the resulting consequences of that fact cannot realistically be ignored at the hearing on temporary removal. See *Jack v. Clinton*, 259 Neb. 198, 210, 609 N.W.2d 328, 336-37 (2000) (discouraging trial courts from granting temporary removal because consideration of the removing parent's and removed children's time out of state is unavoidable in later determinations of the best interests of the children in permanent removal hearings). Nonetheless, the trial court here clearly recognized Brian's concerns. The court stated that it needed to "make very, very clear" that it did not think that what Rebecca did was appropriate. The court explained, "This was terrible. It put this whole case in an awful position as well as Sarah." The court concluded, "And I want to be clear as I do this and grant [Rebecca's] motion [for directed finding] and therefore deny the petition for injunction, that this does not mean I'm granting removal, that is still to be heard, or I'm granting custody." We are confident that the trial court will proceed accordingly on all issues pending before it in this case. Thus, despite the circumstances, Brian will have his day in court at the hearing on temporary removal when Rebecca will be required to demonstrate that it is in Sarah's best interests to be removed from Illinois or else return her to Illinois. See *R.B.P.*, 393 Ill. App. 3d at 976 (reversing the trial court's order that directed the mother to return the child, whom she had removed prior to the commencement of any Parentage Act proceedings, and observing in *dicta* that it would

be better to hear evidence on the child's best interests before simply ordering the return of the child).

¶ 21 Brian also maintains that the trial court improperly ignored the presumption that maximum involvement of both parents is in a child's best interests (750 ILCS 5/602 (West 2010)). Brian's argument is disingenuous in light of his insistence that the best-interests-of-the-child standard did not apply to the proceedings on injunctive relief. Moreover, based on the trial court's obvious concern about Sarah's best interests, the argument lacks merit. In any case, Sarah's best interests, as fully outlined in section 602 of the Act, will be the focus at the hearing on temporary removal.

¶ 22 Given our conclusion that the trial court did not abuse its discretion in denying Brian's request for injunctive relief based on its finding that Brian failed to establish that he would suffer irreparable harm without an injunction, we need not address the parties' remaining arguments. See *Postma v. Jack Brown Buick, Inc.*, 157 Ill. 2d 391, 399 (1993) (stating that on an interlocutory appeal, the only question properly before the reviewing court is whether there was a sufficient showing made to sustain the trial court's order granting or denying the interlocutory relief sought); *Forsberg v. Edward Hospital*, 389 Ill. App. 3d 434, 440 (2009) (stating that we review the trial court's judgment rather than its reasoning, and therefore may affirm on any basis in the record). Neither do we need to address Rebecca's request that we strike and disregard Brian's reliance on *In re Marriage of Coulter and Trinidad*, 2011 IL App (3d) 110424-UB, an unpublished order under Supreme Court Rule 23(b) (eff. July 1,2011).

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 24 Affirmed.